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In the SUPREME COURT OF THE UNITED STATES

October Term, 1997

SERGEANT JAMES G. WITHAM, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Armed Forces

PETITION FOR A WRIT OF CERTIORARI

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42 pp

QUESTIONS PRESENTED

I

Whether the court of appeals erred in ruling that an Act of Congress violates the Due Process Clause of the Fifth Amendment when a military accused exercises his unfettered statutory right to peremptorily challenge a court-martial member on the basis of gender.

II

Whether this Court should reconsider its decision that a criminal accused, in exercising a peremptory challenge, is a state actor.

TABLE OF CONTENTS

Page

Opinions Below 1

Jurisdiction 1

Statute and Constitutional Provision Involved 2

Statement 2

Reasons for Granting the Petition 8

Conclusion 14

Appendix A 1a

Appendix B 17a

TABLE OF AUTHORITIES

Cases:

Batson v. Kentucky, 476 U.S. 79 (1986) . . . . . *passim*
Bolling v. Sharpe, 347 U.S. 497 (1954) 10
Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991) . . . . . *passim*
Ex Parte Milligan, 71 U.S. (4 Wall.) 2 (1866) 11
Georgia v. McCollum, 505 U.S. 42 (1992) . . . . . *passim*
Gilligan v. Morgan, 413 U.S. 1 (1973) 8
Goldman v. Weinberger, 475 U.S. 503 (1986) 8
Holland v. Illinois, 493 U.S. 474 (1990) 3
J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127 (1994) . . . . . *passim*
Middendorf v. Henry, 425 U.S. 25 (1976) 10
Pointer v. United States, 151 U.S. 396 (1894) 2
Rostker v. Goldberg, 453 U.S. 57 (1981) 8
Stilson v. United States, 250 U.S. 583 (1919) 3

Solorio v. United States, 483 U.S. 435 (1987) 8
Swain v. Alabama, 380 U.S. 202 (1965) 3
United States v. Butler, 297 U.S. 1 (1936) 10
United States v. Crawford, 15 U.S.C.M.A. 31,
35 C.M.R. 3 (1964) 5
United States v. Santiago-Davila,
26 M.J. 380 (C.M.A. 1988) 5
United States v. Smith, 27 M.J. 242 (C.M.A. 1988) 5
Weiss v. United States, 510 U.S. 163 (1994) 8, 10, 11
United States v. Butler, 297 U.S. 1 (1936) 10

Constitution:

U.S. Const. amend. V 2
U.S. Const. amend. VI 11
U.S. Const. amend. VII 11
U.S. Const. art. 1, § 8, cl. 14 8

Statutes and Rules:

28 U.S.C. § 1259(3) 1
Article 16, U.C.M.J., 10 U.S.C. § 816 4
Article 22, U.C.M.J., 10 U.S.C. § 822 5
Article 25, U.C.M.J., 10 U.S.C. § 825 . . . . . 5, 11
Article 41, U.C.M.J., 10 U.S.C. § 841 . . . . . 2, 5, 9
Article 107, U.C.M.J., 10 U.S.C. § 907 2
Article 120, U.C.M.J., 10 U.S.C. § 920 2
Article 132, U.C.M.J., 10 U.S.C. § 932 2
Article 134, U.C.M.J., 10 U.S.C. § 934 2

Legal Periodicals:

E. Warren, *The Bill of Rights and the Military*,
37 N.Y.U.L. Rev. 181 (1962) 8

Miscellaneous:

Blackstone, 4 Commentaries (1st ed. 1769) 3
Fed. R. Crim. Proc. 24 3

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PETITION FOR A WRIT OF CERTIORARI

Sergeant James G. Witham, U.S. Marine Corps, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Armed Forces.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-16a) is reported at 47 M.J. 297 (1997). The opinion of the Navy-Marine Corps Court of Criminal Appeals (App. 17a-24a) is reported at 44 M.J. 664 (N.M. Ct. Crim. App. 1996).

JURISDICTION

The United States Court of Appeals for the Armed Forces entered its judgment on September 30, 1997. This Court's jurisdiction is invoked under 28 U.S.C. § 1259(3).

STATUTE AND CONSTITUTIONAL PROVISION INVOLVED

Article 41(b)(1), Uniform Code of Miliary Justice, 10 U.S.C. § 841(b)(1), provides in part:

> Each accused and the trial counsel are entitled initially to one peremptory challenge of the members of the court.

The Fifth Amendment of the Constitution provides in part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .

STATEMENT

Petitioner was tried by a general court-martial, and was convicted of making a false official statement and filing a false travel claim, in violation of Articles 107 and 132, Uniform Code of Military Justice [U.C.M.J.], 10 U.S.C. §§ 907 and 932. He was acquitted of charges of rape, adultery, and kidnapping, in violation of Articles 120 and 134, U.C.M.J., 10 U.S.C. §§ 920 and 934. He was sentenced to confinement for eight months, to forfeiture of $500.00 pay per month for four months, to reduction to the lowest enlisted paygrade, and to a bad conduct discharge. The Navy-Marine Corps Court of Criminal Appeals and the Court of Appeals for the Armed Forces affirmed.

1. This case involves Congressional authority to grant a military accused the unfettered right to peremptorily challenge a member of his court-martial panel. For more than a century, this Court has steadfastly recognized the peremptory challenge as "one of the most important rights

secured to the accused." *Pointer v. United States*, 151 U.S. 396, 408 (1894). "While the Constitution does not confer a right to peremptory challenges, those challenges traditionally have been viewed as one means of assuring the selection of a qualified and unbiased jury." *Batson v. Kentucky*, 476 U.S. 79, 91 (1986) (citing *Swain v. Alabama*, 380 U.S. 202, 219 (1965) and *Stilson v. United States*, 250 U.S. 583, 586 (1919)). The peremptory challenge protects the valuable right to an impartial jury in a number of ways. It enables litigants to remove potential jurors who are not otherwise challengeable for cause, under the belief that experienced attorneys will often correctly discern which jurors are likely to be the least sympathetic to their client's cause but will be unable to provide a sufficient basis for their intuition. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 148 (1994) (O'Connor, J., concurring). It permits attorneys to question a potential juror vigorously during voir dire without fearing the consequences of offending the juror. It functions to reassure the litigants, particularly the criminal accused, of the fairness of the jury that will decide their case. Blackstone, 4 Commentaries 353 (1st ed. 1769). Finally, "the role of litigants in determining the jury's composition provides one reason for wide acceptance of the jury system and of its verdicts." *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 630 (1991). Its significance is validated by its perseverance: it was well established at the time of Blackstone and continues to endure in all the states, *Holland v. Illinois*, 493 U.S. 474, 484 (1990), and in federal trials. Fed. R. Crim. Proc. 24.

Historically, the peremptory challenge was exercised without a stated reason, without inquiry, and without being subject to a court's control. In recent years, however, this Court has subjected the peremptory challenge to increased scrutiny. In *Batson v. Kentucky*, the Court altered the nature of the peremptory challenge when it restricted the

prosecutor's unfettered discretion to strike a juror. In *Batson*, the Court declared that a criminal defendant has an equal protection right to be tried by a jury from which no "cognizable racial group has been excluded." *Batson*, 476 U.S. at 96. As a result, the Court held that it was unlawful for a criminal prosecutor to exercise a peremptory challenge against a juror on account of the juror's race. *Id.* The Court has significantly modified and expanded *Batson* in three subsequent decisions.

In *Edmonson v. Leesville Concrete Co.*, the Court applied *Batson* to private federal litigants. The Court reasoned that the exercise of a peremptory challenge was in the course of state action and was therefore subject to constitutional constraints. *Edmonson*, 500 U.S. at 619. Applying the Due Process Clause of the Fifth Amendment, the Court held that race-based exclusion of potential jurors violated the excluded persons' equal protection rights. *Id.* at 631. In *Georgia v. McCollum*, 505 U.S. 42 (1992), the Court continued to extend the principles of *Batson* by prohibiting racially-based peremptory challenges by a criminal defendant. The Court held that a criminal defendant, in the exercise of the challenge, is a state actor and as a result is subject to the Equal Protection Clause. Finally, in *J.E.B. v. Alabama ex rel. T.B.*, a state civil case, the Court expanded the rationale of *Batson* to challenges based on gender. It held that the exclusion of a juror because of the juror's gender violated the equal protection rights of not only the litigants, but also the jurors. *J.E.B.*, 511 U.S. at 140.

2. In sharp contrast to civilian jury selection procedures, the military justice system implements a detailed statutory scheme to create a court-martial. Preliminarily, the accused selects one of several different trial settings. The accused may elect to be tried by military judge alone, permitting the judge to determine the accused's guilt and, if necessary, to adjudge the appropriate sentence. Article 16, U.C.M.J., 10

U.S.C. § 816. Alternatively, the accused may elect to be tried and sentenced by the members of a court-martial, the armed forces version of a trial by jury. *Id.* Court members are assigned to a court-martial by the appropriate convening authority, usually the accused's commanding general or admiral. Article 22, U.C.M.J., 10 U.S.C. § 822. In selecting each member the convening authority must consider specific statutory criteria such as the member's age, education, training, experience, length of service, and judicial temperament. Article 25, U.C.M.J., 10 U.S.C. § 825. Significantly, the convening authority may consider race or gender when choosing panel members to try the accused. *United States v. Crawford*, 15 U.S.C.M.A. 31, 35 C.M.R. 3, 13 (1964) ("deliberate selection of a Negro to serve on the accused's court-martial" did not deny equal protection of the laws); *United States v. Smith*, 27 M.J. 242, 249 (C.M.A. 1988) ("In our view, a convening authority may take gender into account in selecting members, if he is seeking in good faith to assure that the court-martial panel is representative of the military population").

Against the convening authority's extensive power to choose members, Congress granted the military accused one peremptory challenge. Article 41, U.C.M.J., 10 U.S.C. § 841. Congress placed no limitation on the exercise of this challenge. However this limitation has been eroded by the application of *Batson* and its progeny to trial by courts-martial. In *United States v. Santiago-Davila*, 26 M.J. 380 (C.M.A. 1988), the Court of Military Appeals (now the Court of Appeals for the Armed Forces) held a military accused's equal protection rights were violated when a cognizable racial group had been excluded by the prosecutor. *Id.* at 390. The court based its decision on an accused's equal protection rights under the Due Process Clause of the Fifth Amendment. *Id.* However, this Court has yet to decide whether *Batson* and its progeny apply to a criminal

accused in the military justice system.

3. At petitioner's trial for various offenses, including kidnapping and rape, the convening authority selected a court-martial panel that included one female member. App. 3a. During individual voir dire of this member, she revealed she had been previously held up at gun point and further stated that she was acquainted with the rape victim, although not socially. *Id.* She stated that neither of these factors would affect her impartiality to sit on the panel. *Id.* Following voir dire, defense counsel sought to peremptorily challenge her. *Id.* The trial counsel (the military prosecutor) objected:

> TC: Your Honor, in light of the fact that the victim's sex is female and the member being challenged is female, the Government would ask that the defense be required to show a -- some type of a reason other than --
>
> MJ: Are you talking about the *Batson* case and so on --
>
> TC: Yes, sir. *McCollum*, I believe, is the authority.
>
> MJ: Is there anything -- I'm sorry. Did the sex of Staff Sergeant Haynes -- for the record she is female. Did that enter into your decision to preempt?
>
> DC: Yes, it did, sir.

Id. at 3a-4a.

The military judge denied the peremptory challenge as improperly based on gender. *Id.* at 4a.

On appeal, the Navy-Marine Corps Court of Criminal Appeals rejected petitioner's contention that he was improperly deprived of his statutory right to peremptorily challenge a female member. App. 17a-24a. After reviewing *Batson*, *J.E.B.*, and *McCollum*, the court concluded that the Constitution forbids a military accused from exercising a peremptory challenge on the basis of gender in whole or in part. *Id.* at 22a. Further, without discussion, the court concluded that a military accused was a state actor under *McCollum*. *Id.*

The United States Court of Appeals for the Armed Forces affirmed and held that a military accused's exercise of a gender-based peremptory challenge was unconstitutional. App. 3a-16a. The court of appeals' decision rested on three grounds. First, the court implicitly determined that servicemembers have an equal protection/due process right against being removed from a court-martial panel based on gender. *Id.* at 9a. Second, the court analogized a military accused to a civilian criminal defendant and concluded a military accused is a state actor under *McCollum*. *Id.* at 11a. Third, the lower court examined the member selection procedure established by Congress. The court noted that Congress entrusts the convening authority with the responsibility of selecting members. Moreover, the court observed that the convening authority is not prohibited from considering gender when selecting members for a court-martial panel. *Id.* at 13a. Nevertheless, despite the fact that a convening authority considers gender when selecting panel members, the lower court held that *McCollum* prohibited a military accused from considering gender when exercising a peremptory challenge.

REASONS FOR GRANTING THE PETITION

The court of appeals held that the Constitution prohibits an accused from challenging a court-martial member based on the member's gender. This holding declares an Act of Congress unconstitutional in that Congress grants military accused the unfettered right to peremptorily challenge any court-martial member. It also misapplies this Court's decisions in the area of peremptory challenges because there is no equal protection violation when a court-martial panel member, as opposed to a civilian juror, is challenged on the basis of gender. Finally, the holding continues to extend the unexpected rule that a criminal accused, who is being prosecuted by the state against his desires, is a state actor when he challenges a juror. As a result, this Court's review is warranted.

1. The Constitution commits exclusively to the Congress the powers "To make rules for Government and regulation of the land and naval forces." U.S. Const. art. 1, § 8, cl. 14. This Court reduces its scrutiny of Congress in matters of the military because the Constitution gives Congress "broad constitutional power to raise and regulate armies and navies." *Rostker v. Goldberg*, 453 U.S. 57, 65 (1981) (citation omitted). Moreover, there is a practical reason to do so: "[C]ourts are ill equipped to determine the impact upon discipline that any particular intrusion upon military authority might have. Many of the problems of the military society are, in a sense, alien to the problems with which the judiciary is trained to deal." E. Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L. Rev. 181, 187 (1962), *cited in part in Goldman v. Weinberger*, 475 U.S. 503, 507 (1986). *See Gilligan v. Morgan*, 413 U.S. 1, 10 (1973) (it is difficult to conceive of an area of governmental activity in which the courts have less competence). "Judicial deference thus 'is at its apogee' when reviewing congressional

decisionmaking in this area." *Weiss v. United States*, 510 U.S. 163, 177 (1994).

"Congress has the primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military." *Solorio v. United States*, 483 U.S. 435, 447 (1987). In an exercise of this power, Congress established the Uniform Code of Military Justice. 10 U.S.C. §§ 801-946. With the passage of the Code in 1950, Congress granted a military accused the ability to challenge one court-martial member for any reason desired. Congress placed no limitation on this right. However, despite the normal deference shown to Congress in matters of military justice, the court of appeals applied this Court's decision in *J.E.B. v. Alabama ex rel. T.B.*[1] and ruled that this unfettered discretion was unconstitutional when the challenge was based on a member's gender. This ruling effectively rendered a significant part of Article 41(b), U.C.M.J., 10 U.S.C. § 841(b), an act of Congress, unconstitutional without showing the necessary deference to the decisions of Congress in military matters.

This lack of deference to Congress threatens to burden the administration of military justice with time consuming case by case litigation concerning the motivation behind the exercise of a peremptory challenge. As Justice O'Connor, concurring after having joined the majority opinion,

---

[1] The lower court felt obligated to follow this Court's decision in *McCollum* and *J.E.B.* The Court noted that any attack on the issue of a criminal defendant as a state actor must be lodged with this Court. App. 5a n.2. However, Justice O'Connor, who had joined four other Justices in the majority opinion, specifically stated that the holding of *J.E.B.* should not be extended to criminal accused. *J.E.B.*, 511 U.S. at 147 (concurring). As a result, the decision in *J.E.B.* does not resolve whether a criminal accused is a state actor when challenging a juror based on the juror's gender.

observed in *J.E.B*:

> *Batson* mini-hearings are now routine in state and federal trial courts, and *Batson* appeals have proliferated as well. Demographics indicate that today's holding [impermissible for party to strike juror based on gender] may have an even greater impact than did *Batson* itself. In further constitutionalizing jury selection procedures, the Court increases the number of cases in which jury selection -- once a sideshow -- will become part of the main event.

J.E.B. v. Alabama ex rel. T.B., 511 U.S. at 147. The harm from these mini-hearings is "a particular burden to the Armed Forces because virtually all the participants, including the defendant and his counsel, are members of the military whose time may be better spent than in possibly protracted disputes over the imposition of discipline." *Middendorf v. Henry*, 425 U.S. 25, 45-46 (1976). If a change in court-martial peremptory challenges is necessary, Congress is best situated to do so and not the lower court in the guise of following this Court's precedent. Accordingly, this petition for writ of certiorari should be granted "to review the exercise of the grave power of annulling an Act of Congress," *United States v. Butler*, 297 U.S. 1 (1936), which had been passed under its authority to make rules for the armed forces.

2. Further, this Court should grant review because the lower court's holding misapplied the Court's decisions in the area of equal protection and peremptory challenges. The Equal Protection Clause of the Fourteenth Amendment protects jurors' right to avoid racial and gender discrimination during the exercise of peremptory challenges

against them. *Batson*, 476 U.S. at 89; *McCollum*, 505 U.S. at 48-55; *J.E.B.*, 511 U.S. at 146. This holding has been applied to federal litigants through use of the "equal protection component of the Fifth Amendment's Due Process Clause." *Edmonson*, 500 U.S. at 616 (citing *Bolling v. Sharpe*, 347 U.S. 497 (1954)). It was this equal protection analysis (from *Edmonson*, *McCollum*, and *J.E.B.*) that the lower court applied in this case. However, the court failed to appreciate that this equal protection analysis does not apply in the same manner to the actions of Congress in the area of military justice.

"Congress, of course, is subject to the requirements of the Due Process Clause when legislating in the area of military affairs . . . ." *Weiss*, 510 U.S. at 176. When faced with a due process challenge to a facet of the military justice system, this Court will determine, whether the factors weighing in favor of the challenged procedure are so "extraordinarily weighty" as to overcome the balance struck by Congress. *Id.* at 177-178. This is not the same strict scrutiny applied in *Batson* and its progeny. Applying the correct *Weiss* analysis, it is clear that the interests of the court-martial members (in being considered for selection to or removal from a court-martial panel without regard to gender) are not so extraordinarily weighty so as to overcome the delicate balance struck by Congress. As stated above, unlike a civilian jury, the convening authority selects the members for a court-martial. Article 25, U.C.M.J., 10 U.S.C. § 825. The convening authority **may consider a prospective member's gender when determining if the member is qualified to sit as a court member**. *Smith*, 27 M.J. at 249. Similarly, military accused should be able to consider the member's gender when determining whether to exercise their sole peremptory challenge. The lower court's decision is nonsensical in that it strips from a military accused the ability to exercise a peremptory challenge based

on gender when the convening authority may have specifically considered gender in appointing the members to the court-martial. The Due Process Clause does not mandate this decision, and, as a result, the lower court erred when it found the statute unconstitutional.[2]

In addition, the court of appeals' holding misapprehends the nature of the court-martial selection process by bestowing prospective panel members an equal protection right to sit on a court-martial panel even though they have no constitutional right to sit on a court-martial panel. The Sixth and Seventh Amendment of the Constitution recognize a right to a trial by jury. *Batson* and its progeny recognized the harm to the juror when race or gender was "the sole reason for denying the excluded venireperson the honor and privilege of participating in our system of justice." *Edmonson*, 500 U.S. at 619. The constitutional importance of a juror's participation was an implicit basis for the rulings in *Batson* and its progeny. However, in the military, the court-martial member, unlike a civilian juror, does not have this same constitutional interest. Courts-martial are not subject to the jury requirements of the Constitution. *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2, 123 (1866) (The right to a trial by jury -- "one of the most valuable in a free country -- is preserved to every one accused of a crime who is not attached to the army, or navy"). Moreover, the convening authority selects the members based on specific criteria, including gender. This combination of factors demonstrates prospective court-martial members have no constitutional right to sit on a court-martial panel. Without this right, an application of *Batson* and its progeny is misplaced.

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[2] Until this case, a court-martial member could be discriminated against by an accused through the exercise of a peremptory challenge. This historic practice demonstrates further that there is no due process violation in this case. *See Weiss*, 510 U.S. at 179.

3. In characterizing a criminal defendant as a state actor, this Court made a surprising conclusion in *McCollum*. A criminal defendant, who attempts to defend himself from the actions of the state, desires to have no contact or involvement with the state. *McCollum*, 505 U.S. at 70 (Scalia, J., dissenting). It is fundamentally unfair to characterize a criminal defendant as a state actor insofar as "from arrest, to trial, to possible sentencing and punishment, the antagonistic relationship between the government and the accused is clear for all to see." *Id.* at 67 (O'Connor, J., dissenting). This unexpected holding brings unexpected results: in this case, the defendant is now asking that Congress's law be upheld, and the attorneys for the United States have argued that Congress's law is unconstitutional. This absolutely bizarre role reversal that is mandated by the decision in *McCollum* warrants reconsideration.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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December 1997

APPENDIX A

U.S. COURT OF APPEALS FOR THE ARMED FORCES

No. 95-1179

Crim.App. No. 95 0906

United States, *Appellee*

v.

James G. WITHAM, Sergeant
U.S. Marine Corps, *Appellant*

Argued Apr. 9, 1997

Decided Sep. 30, 1997

For Appellant: *Lieutenant C.J. McEntee*, JAGC, USNR (argued); and *Lieutenant J.K. Var Nest*, JAGC, USNR.

For Appellee: *Lieutenant R. J.E. Verby*, JAGC, USNR (argued); *Colonel Charles Wm. Dorman*, USMC and *Commander D.H. Myers*, JAGC, USN (on brief); *Lieutenant Andrew J. Waghorn*, JAGC, USNR.

Opinion of the Court

SULLIVAN, Judge:

During December of 1994 and January of 1995, appellant was tried by a general court-martial composed of officer and enlisted members at Marine Corps Logistics Base, Albany, Georgia. Contrary to his pleas, he was found guilty of making a false official statement and filing a false travel claim, in violation of Articles 107 and 132, Uniform Code of Military Justice, 10 USC §§ 907 and 932, respectively. He was sentenced to a bad-conduct discharge, confinement for 8 months, forfeiture of $500 pay per month for 4 months, and reduction to E-1. On May 11, 1995, the convening authority approved the sentence as adjudged. On May 31, 1996, the Court of Criminal Appeals affirmed the findings and sentence as adjudged and approved. 44 MJ 664.

On October 28, 1996, this Court granted review of the following issue:

I

WHETHER THE MILITARY JUDGE ERRED BY DEPRIVING APPELLANT OF HIS STATUTORY RIGHT TO PEREMPTORILY CHALLENGE A FEMALE MEMBER OF HIS COURT-MARTIAL PANEL.

We hold that gender, like race, is an impermissible basis for the exercise of a peremptory challenge by either the prosecution or the military accused. *See J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994); *Georgia v. McCollum*, 505 U.S. 42, 112 S.Ct. 2348,

120 L.Ed.2d 33 (1992); *United States v. Annigoni*, 96 F.3d 1132, 1139 (9th Cir. 1996) (en banc). The military judge, therefore, did not err in denying appellant's peremptory challenge of a detailed female court member based solely on her gender. *See also United States v. Smith*, 27 MJ 242 (CMA 1988).

Appellant was charged with various offenses at his court-martial, including kidnapping and rape. Following *voir dire* of the court-members, defense counsel peremptorily challenged the only female panel member, Staff Sergeant (SSgt) H. There had been no prior attempt made by the defense to challenge SSgt H for cause.

During individual *voir dire*, SSgt H had been questioned by the military judge and both counsel. She testified that she had previously been held up at gun point and that she knew the alleged rape victim from prior interactions but did not socialize with her. She indicated that neither factor would affect her impartiality. H further testified that none of her friends or family had ever been the victim of a sexual assault. Defense counsel then concluded his individual *voir dire* of SSgt H by asking, "if a woman was to testify, as a woman would you feel more inclined to believe her testimony or not?" H, in response stated, "It doesn't matter what sex they are, sir. It doesn't matter to me if she is a woman or not; it's the basis of truth in the testimony I'm convinced by. Her sex--it doesn't matter that she's a woman. It doesn't have any bearing on what I would feel."

At the conclusion of *voir dire*, defense counsel sought to peremptorily challenge SSgt H. The following colloquy then occurred:

> TC: Your Honor, in light of the fact that the victim's sex is female and the member being challenged is female, the Government would ask that the defense be required to show a-some type of a reason other than-
>
> MJ: Are you talking about the *Batson* case and so on-
>
> TC: Yes, sir. *McCollum*, I believe, is the authority.
>
> MJ: Is there anything-I'm sorry. Did the sex of Staff Sergeant Haynes-for the record, she is female. Did that enter into your decision to preempt?
>
> DC: Yes, it did, sir.

The military judge, noting that SSgt H was the only female panel member, denied the challenge as improperly based on gender. The judge did allow the defense another opportunity to peremptorily challenge one of the other remaining court members, which the defense did. However, playing the "numbers" game,[1] the defense later was allowed to rescind

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[1] A finding of guilty in a non-capital court-martial case such as this requires a two-thirds vote of the members of the panel. Art. 52(a)(2), Uniform Code of Military Justice, 10 USC § 852(a)(2). "[A]ny fraction of a vote" required for conviction "is rounded up to the next whole number"; thus, a six-member panel requires four votes to convict, while a panel of seven requires five. RCM 921(c)(2)(B), Discussion, Manual for Courts-Martial, United States (1995 ed.). Accordingly, defense counsel's withdrawal of his peremptory challenge meant five rather than four votes were required for conviction in this case.

its challenge and chose not to utilize it.

Appellant was found not guilty of rape and kidnapping but guilty of the other offenses noted above. The Court of Criminal Appeals affirmed the military judge's ruling denying appellant's gender-based peremptory challenge. It held that a military accused cannot exercise a peremptory challenge based upon a potential court member's gender. 44 MJ at 666.

Appellant asserts that the military judge incorrectly denied his peremptory challenge of SSgt H because it was based on her female gender. He acknowledges that the military judge's ruling can be sustained on the basis of the decisions of the Supreme Court in *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (party to civil action may not exercise peremptory challenge based on gender), and *Georgia v. McCollum*, 505 U.S. 402 (criminal defendant may not exercise peremptory challenge on basis of race of juror), although he questions the soundness of the latter decision.[2] Nevertheless, he asks this Court to "digress" from these Supreme Court precedents, Final Brief at 14-15, and not apply them to his sole peremptory challenge at his court-martial. *See* Art. 41(b)(1), UCMJ, 10 USC § 841(b)(1).

As a starting point, we note that this Court is a court of law (*see* Art. 67(c), UCMJ, 10 USC § 867(c)(1994)) and we are generally not free to "digress" from applicable

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[2] Appellate defense counsel's attack on the majority opinion in *Georgia v. McCollum*, 505 U.S. 42 (1992), must be lodged with the Court that issued that opinion. We reject any suggestion by that counsel that *McCollum, supra,* should not be applied in the military justice system because it was wrongly decided by the Supreme Court.

Supreme Court precedent applying the Constitution to criminal trials. *See generally Weiss v. United States*, 510 U.S. 163 (1994). Moreover, it is a "principle[] of law. . . generally recognized in the trial of criminal cases in the United States district courts. . ." that a criminal defendant may not exercise a peremptory challenge on the basis of race or gender. Art. 369(a), UCMJ, 10 USC § 836(a); *see generally Annigoni*, 96 F.3d at 1138 n.8; *United States v. Tokars*, 95 F.3d 1520, 1534 (11th Cir. 1996); *United States v. Lampkins*, 47 F.3d 175, 178 (7th Cir. 1995); *United States v. Bergodere*, 40 F.3d 512, 515 (1st Cir. 1994).

In addition, this Court has repeatedly held that the *Batson* line of cases (*Batson v. Kentucky*, 476 U.S. 79 (1986)), which *J.E.B. v. Alabama ex rel. T.B., supra*) is part of, applies to the military justice system. *United States v. Greene*, 36 MJ 274 (CMA 1993); *United States v. Moore*, 28 MJ 366 (CMA 1989); *United States v. Santiago-Davila*, 26 MJ 380 (CMA 1988). Finally, appellant concedes that extension of that line of cases to prohibit sexual discrimination by the Government in the military justice system is appropriate. *See generally J.E.B. v. Alabama ex rel. T.B., supra; see United States v. Smith*, 27 MJ 242. Accordingly, our primary concern on this appeal is whether the constitutional prohibition against sexual discrimination in the exercise of peremptory challenges must be applied *to an accused in the military justice system. See Georgia v. McCollum, supra; see generally Parker v. Levy*, 417 U.S. 733, 758 (1974) (members of armed forces "not excluded from the protection granted by the First Amendment," but "different character of the military community and . . . mission requires a different application" of this constitutional protection).

On this question, appellant makes three distinct, albeit related, arguments. First, he asserts that a military person, unlike his civilian counterpart, has no right to serve as a member of a court-martial. Thus, he contends that the Supreme Court decision in *McCollum*, which protects a civilian's right to serve on a jury without being subjected race or sex discrimination is simply inapplicable in the military justice system. Reply Brief at 5. Second, he asserts that "a military accused has absolutely no say in who is detailed to his court-martial"; therefore, he is not a state actor within the meaning of *McCollum*. Reply Brief at 5-6. Finally, he asserts that the military justice system is fundamentally different from the civilian justice systems because our system gives unlimited peremptory challenges to the Government and "one and only" one peremptory challenge to the defense. Final Brief at 8. Thus, he contends that it would be grossly unfair to follow *McCollum* and to place on "the lonely military accused" the burden of rectifying the "Government's 'embarrassing' legacy" of sexual discrimination. Final Brief at 13.

I

We turn first to appellant's argument that the Supreme Court decisions on peremptory challenges should not be applied to an accused in a court-martial case. He asserts that a "convening authority is granted absolute authority in detailing military members to a court-martial convening order" under Article 25, UCMJ, 10 USC § 825. He further asserts that "[m]any military members, therefore, are treated unequally in this process because a convening authority may intentionally exclude them from participation." Reply brief at 4. Accordingly, he argues that Supreme Court decisions protecting a civilian's right to sit on a jury could not possibly apply to the military because the

servicemember has no right whatsoever to sit as a member of a court-martial. *Id.* at 5.

It is beyond cavil that there are differences between our military justice system and the various civilian criminal justice systems in our country. However, these differences do not necessarily dictate that constitutional decisions on civilian criminal justice be found *per se* inapplicable to the military justice system. *See generally Parker*, 417 U.S. at 756 (applying vagueness standard for "criminal statutes regulating economic affairs" to Articles 133 ad 134, UCMJ, 10 USC §§ 933 and 934, respectively). For example, this Court did not reject the *Batson* line of cases prohibiting racial discrimination in peremptory challenges simply because a military accused has no Sixth Amendment right to trial by jury. *See Ex Parte Quirin*, 317 U.S. 1, 39-40 (1942). Speaking for the Court, then-Chief Judge Everett made this point clear in *Santiago-Davila*, 26 MJ at 389-90:

> *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986)--which was decided after appellant's trial--is not based on a right to a representative cross-section on a jury but, instead, on an equal-protection right to be tried by a jury from which no "cognizable racial group" has been excluded. *See id.* at 96, 106 S.Ct. at 1723. This right to equal protection is a part of due process under the Fifth Amendment, *see Frontiero v. Richardson*, 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973); *Bolling v. Sharpe*, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954); and so it applies to courts-martial, just as it does to civilian juries.

Admittedly, the method for detailing prospective court members for courts-martial differs from the method of selecting potential jurors. *See United States v. McClain*, 22 MJ 124, 128-29 (CMA 1986); *cf. United States v. Contreras*, 108 F.3d 1255, 1265-68 (10th Cir. 1997). However, the convening authority does not have absolute discretion to select court members for courts-martial (*see* Art. 25) nor can he do so in a way that violates the Constitution or the Code. *See United States v. Hilow*, 32 MJ 439 (CMA 1991); *Smith*, 27 MJ at 250 (convening authority may not purposefully detail female members to achieve guilty verdict). Moreover, once detailed a member and the court-martial has begun, the military member may only be removed with the permission of the military judge or a majority of the court. *See* Art. 25 and RCM 912(f)(3) and (h) and 801(a)(3), Manual for Courts-Martial, United States (1995 ed.). In this context and in view of our past precedent, we reject appellant's argument that a servicemember does not have an equal protection/due process right against being removed from a court-martial panel because of race *or sex*. *See generally United States v. Tulloch*, No. 96-5008, ___ MJ ___ (Sept. 30, 1997); *United States v. Greene*, 36 MJ 274.

II

We next turn to appellant's argument that a military accused is not a "state actor" for purposes of the Fifth Amendment and the decision of the Supreme Court in *Georgia v. McCollum*, 505 U.S. 42. He contends that it is "terminally absurd" to apply to logic and "legal fiction" of *McCollum* to a military accused who has no right to trial by jury or any say whatsoever in the composition of his court-martial panel. Reply Brief at 5-6. We reject appellant's hyperbole and conclude that a military accused is a "state

actor" for purposes of his peremptory challenge at a court-martial. *See generally United States v. DeGross*, 960 F.2d 1433, 1440-42 (9th Cir. 1992).

Again, we note that a military accused has no right to a trial by jury under the Sixth Amendment. *See Ex Parte Quirin*, *supra*. He does, however, have a right to due process of law under the Fifth Amendment (*see* ___ MJ at (*11-12*)), and Congress has provided for trial by members at a court-martial. *See* Art. 16(1)(A); *see generally Weiss*, 510 U.S. at 176-78. Part of the process due is the right to challenge for cause and challenge peremptorily the members detailed by the convening authority. Art. 41. Moreover, it is a military judge or, if none, the court-martial as a whole, who must decide these various challenges by a military accused. *See* RCM 912(f)(3) and (h) and 801(a)(3). It is these features of the military justice system which permit a military accused to use the power of the Government to remove members from his court-martial. *See Annigoni*, 96 F.3d at 1137.

More particularly, like a civilian defendant, a military accused has challenges for cause and peremptory challenges. *Id.* at 1136-37. The peremptory challenge in the court-martial system is a statutory creation of Congress. Art. 41. It performs a well-recognized role in the selection of qualified and impartial court members. *See Edmonson v. Leesville Concrete Col. Inc.*, 500 U.S. 614, 620, 111 S.Ct. 2077, 2085 (1991); *United States v. Carter*, 25 MJ 471, 474 (CMA 1988). Moreover, although only one peremptory challenge is normally allowed each side, this procedure does not change the nature of an accused's peremptory challenge as state action. *See J.E.B.*, 511 U.S. at 142 n.13, 114 S.Ct. at 1428 n.13 ("The exclusion of even one juror for impermissible reasons harms that juror and undermines

public confidence in the fairness of the system."). Finally, because it is the military judge who must discharge the perspective court member, "[r]egardless of who precipitated the jurors' removal, the perception and the reality in a criminal trial will be that the [military judge] has excused jurors based on race [or gender], an outcome that will be attributed to the" United States. *McCollum*, 505 U.S. at 53, 112 S.Ct. at 2356. In this light, we conclude that a military accused's peremptory challenge is state action and is restricted by the Due Process Clause of the Fifth Amendment to the same extent as is the Government's. *See Annigoni*, *supra* at 1136 n.4.

III

Turning to appellant's final argument, he contends that it is "fundamentally unfair" to burden a military accused with the equal-protection restrictions of *J.E.B. v. Alabama ex rel. T.B.*, *supra* (requiring jurors not to be removed on basis of unlawful sex discrimination). He asserts that a military accused is not responsible for the Government's past sexism in convening courts-martial in the military justice system. He further notes that the convening authority personally details the panel members in the military justice system; therefore, "[t]he Government has the functional equivalent of an unlimited number of peremptory challenges." *See Carter*, 25 MJ at 478 (Cox, J., concurring). Final Brief at 9. Citing his single peremptory challenge, he contends that it is grossly unfair to require him to sacrifice his only chance to influence the composition of his court-martial to remedy a government-created social ill. Final Brief at 10.

As noted, above, "peremptory challenges are not constitutionally protected fundamental rights." *McCollum*,

505 U.S. at 57, 112a S.Ct. at 2358. Congress statutorily authorized use of peremptory challenges for the prosecution and defense at courts-martial in Article 41 of the Code. They are a means to help achieve "the constitutional end of . . . a fair trial." 505 U.S. at 57, 112 S.Ct. at 2358; *see Carter*, 25 MJ at 474 (explaining that peremptory challenges insure "both fairness and the appearance of fairness in the procedure for selecting court-martial members"). However, "the right to a peremptory challenge may be withheld altogether without impairing the constitutional guarantee of an impartial jury and a fair trial." 505 U.S. at 57, 112 S.Ct. at 2358.

The Supreme Court has also rejected the contention that fairness requires defendants to have unrestricted peremptory challenges. *See Georgia v. McCollum*, *supra*. It reiterated that "'if race stereotypes are the price for acceptance of a jury panel as fair,' . . . such a 'price is too high to meet the standard of the Constitution.'" 505 U.S. at 57, 112 S.Ct. at 2358. Moreover, the Court noted, "It is an affront to justice to argue that a fair trial includes the right to discriminate against a group of citizens based upon their race." *Id.* These same conclusions apply to sexual stereotypes as well. *See J.E.B. v. Alabama ex rel. T.B.*, *supra*. We see no military exigency or necessity which requires that a military accused's right to a peremptory challenge be unfettered by these equal-protection concerns. *See generally Parker, supra* at 758 ("different character of the military community and . . . military mission" may require "different application of" constitutional protection).

Admittedly, Congress has initially entrusted the responsibility of selecting qualified court-martial members to the convening authority. Art. 25. The convening authority, however, is not without limits in detailing panel members.

See Art. 25(d). We have clearly stated that a convening authority cannot "pack" the panel against an accused by selecting those most likely to punish accused persons severely. *United States v. McClain*, 22 MJ 124, 131 (CMA 1986); *see United States v. Smith*, 27 MJ 242, 250 (CMA 1988) (convening authority cannot select female members to assure a particular outcome); *United States v. Greene*, 20 USCMA 232, 43 CMR 72 (1970) (convening authority violated the Code by appointing only very senior officers to the court-martial of an E-1); *United States v. Hedges*, 11 USCMA 642, 643, 29 CMR 458, 459 (1960) (upheld reversal because court-martial had distinct appearance of being "hand-picked" by Government); *see also* Art. 37, UCMJ, 10 USC § 837 (prohibiting unlawful command influence). It is also "well-established . . . that the trial counsel, being a partisan advocate, can play no part in the selection of court members." *United States v. Marsh*, 21 MJ 445, 447 (CMA 1986); *see Smith*, 27 MJ at 250-51; *United States v. Cherry*, 14 MJ 251 (CMA 1982). Finally, we continue to maintain a watchful eye in this area as we are "especially concerned to avoid either the appearance or reality of improper selection." *McClain*, 22 MJ at 132. In these circumstances, the convening authority's broad detailing power does not necessitate that a military accused have the freedom to discriminate against prospective court members based upon their gender or race. *See generally Weiss v. United States*, *supra* (the factors supporting civilian rule are not so extraordinarily weighty as to overcome balance struck by Congress).

Finally, we do not agree that a military accused's putative disadvantage in peremptory challenges permits him to exercise his lone challenge in a sexually discriminating manner. The Uniform Code of Military Justice provides the same number of peremptory challenges for the accused and

trial counsel. Art. 41. The view that the convening authority's detailing power creates an unlimited number of government peremptories has not been adopted by a majority of this Court. *Cf. Carter*, *supra* at 478 (Cox, J., concurring). In fact, a majority of this Court has rejected the premise for such a view by holding that this power must be exercised by the convening authority in an impartial manner. *See Smith, supra* at 250-51. Furthermore, we are not persuaded that a benign intent to include servicemembers for purposes of cross-representation equates to an unlawful intent to exclude servicemembers based on their gender. *See generally Holland v. Illinois*, 493 U.S. 474, 482-83 (1990).

In sum, we conclude that *Georgia v. McCollum*, 505 U.S. 42, is applicable to an accused in the military justice system. We further hold that sex discrimination must be prohibited in our system of justice just as racial discrimination has been. As eloquently stated by our late Brother, Judge Wiss, "Racial discrimination is anathema to the military justice system. It ought not - and it will not - be tolerated in any form." *Greene*, 36 MJ at 282 (concurring).[3]

The decision of the United States Navy-Marine Corps Court of Criminal Appeals is affirmed.

Judges CRAWFORD and GIERKE concur.

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[3]In reality, only a total ban on peremptory challenges will eliminate the possibility of racial and gender discrimination in use of such challenges. *See Batson v. Kentucky*, 476 U.S. 79, 107 (1986) (Marshall, J., concurring); Sullivan and Amar, *Jury Reform in America - A Return to the Old Country*, 33 Am. Crim. L. Rev. 1141, 1144-45, 1160-64 (1996).

EFFRON, Judge (concurring):

The military judge decided this issue by applying the principles of law applicable in Federal civilian courts with respect to peremptory challenges made by a defendant. *See J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994) (applying *Batson v. Kentucky*, 476 U.S. 79 (1986), and its progeny to challenges based on gender); *Georgia v. McCollum*, 505 U.S. 42 (1992) (applying *Batson* and its progeny to challenges by a criminal defendant and recognizing due process right of juror to not be challenged for unconstitutional reason). The action of the military judge was consistent with Article 36(a), Uniform Code of Military Justice, 10 USC § 836(a) (trial procedures prescribed by the President "shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter").

I write separately to note the implications of the significant structural differences between court-martial panels and civilian juries. As we observed in *United States v. Tulloch*, No. 96-55008, ___ MJ ___ (Sept. 30, 1997), the Government has a much greater role in shaping the composition of a court-martial than the prosecution is given with respect to the composition of a civilian jury: (1) courts-martial are not subject to the jury trial requirements of the Constitution; (2) military accused are tried by a panel of their superiors, not by a jury of their peers; (3) military panels are selected by the commander who convened the court-martial on a best-qualified basis and are not drawn from a random cross-section of the community; (4) military counsel are provided with only a single peremptory challenge, in contrast to numerous peremptory challenges

permitted by most civilian jurisdictions; and (5) in civilian jurisdictions, the numerous peremptory challenges are used to select a jury, but in courts-martial, a peremptory challenge is used to eliminate those already selected by the convening authority. *See* Art. 25, UCMJ, 10 USC § 825. These differences mean that the ability of an accused to shape the composition of a court-martial is relatively insignificant compared to the influence of the convening authority and trial counsel, who represent the interests of the Government. Under these circumstances, the considerations that led us in *Tulloch* to impose specific procedural requirements on the Government's representative in responding to *Batson* challenges are not applicable to peremptory challenges made by the defense. The reliance in today's opinion on Article 36 and the procedures in federal civilian criminal trials make clear that the obligations of the defense in a court-martial are governed by the requirements applicable in federal civilian criminal trials, not be requirements that we have fashioned to address the unique role of the Government in shaping the composition of a court-martial panel.

COX, Chief Judge (concurring):

I join Judge Effron's separate opinion. I write, essentially, to observe once again that the convening authority has an almost unlimited ability to choose the court members. You may define that power any way you wish, but the corollary to the power to select is the power *not* to select. As Judge Sullivan has observed, in previous cases I have called this corollary "an unlimited number of peremptory challenges." *United States v. Carter*, 25 MJ 471, 478 (CMA 1988)(concurring). I am open to suggestions from the majority for a clearer way to define this phenomena.

APPENDIX B

IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, DC

P.J. McLAUGHLIN W.A. DeCICCO
E.D. CLARK

UNITED STATES

v.

James G. WITHAM, 264 85 5093
Sergeant (E-5), U.S. Marine Corps

NMCM 95 00906 Decided 31 May 1996

Sentence adjudged 12 January 1995. Military Judge: D.J. D'Alesio, Jr. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, Marine Corps Logistics Base, Albany, GA.

LT C.J. MC ENTEE, JAGC, USN, Appellate Defense Counsel

LT ANDREW J. WAGHORN, JAGC, USNR, Appellate Government Counsel

DeCICCO, Senior Judge:

Before a general court-martial composed of members, Sergeant Witham was convicted, contrary to his pleas, of making a false official statement and filing a false travel

claim in violation of Articles 107 and 132, Uniform Code of Military Justice [UCMJ], 10 U.S.C. §§ 907, 932. The court-martial acquitted him of various other offenses, including rape and kidnapping. He was sentenced to be confined for 8 months, to forfeit $500 pay per month for 4 months, to be reduced to pay grade E-1, and to be discharged with a bad-conduct discharge. The convening authority approved the sentence. Before this Court, the appellant assigns 5 errors for our consideration.[1] We find

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[1] I. ACTUAL UNLAWFUL COMMAND INFLUENCE DEPRIVED APPELLANT OF A FAIR TRIAL.

II. THE CONVENING AUTHORITY ERRED IN APPROVING APPELLANT'S SENTENCE BECAUSE THE RECORD OF TRIAL DOES NOT CONTAIN THE MILITARY JUDGE'S ESSENTIAL FINDINGS ON APPELLANT'S MOTION TO DISMISS.

III. APPELLANT'S SENTENCE IS INAPPROPRIATELY SEVERE BECAUSE THE NATURE OF HIS OFFENSES AND THE CHARACTER OF HIS SERVICE DO NOT WARRANT THE IMPOSITION OF A PUNITIVE DISCHARGE.

IV. THE MILITARY JUDGE ERRED BY DEPRIVING APPELLANT OF HIS STATUTORY RIGHT TO PEREMPTORILY CHALLENGE A FEMALE MEMBER OF HIS COURT-MARTIAL PANEL BECAUSE HE BASED HIS DENIAL OF APPELLANT'S CHALLENGE ON THE *BATSON* RATIONALE, WHICH WAS ERRONEOUS IN THAT THE COURT OF APPEALS FOR THE ARMED FORCES HAS NOT YET DECIDED THAT *BATSON* APPLIES TO MILITARY DEFENDANTS' GENDER-BASED PEREMPTORY CHALLENGES AT COURTS-MARTIAL. (CITATIONS OMITTED).

no merit in them and affirm.

The Allegation of Unlawful Command Influence

During a recess in the court-martial, the military judge learned that the Provost marshal officer [PMO], a Major [H], had told the president of the court-martial, Lieutenant Colonel [LtCol] [J], "I don't know why you won't let cops on courts-martial. I mean just because we feel after there's been a criminal investigation, an Article 32 investigation, we think maybe the guy's guilty." Record at 401. This statement was overheard by the deputy base staff judge advocate [DSJA], who immediately informed Major [H] that LtCol [J] was the "President of the Court." He said that Major [H] seemed a little bit surprised. *Id.* The DSJA testified that he did not think Major [H] knew that LtCol [J] was on the court. No other members heard the remark. Record at 405.

The military judge immediately asked LtCol [J] about the incident in the absence of the other members. LtCol [J] stated that he barely understood what Major [H] was saying,

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V. THE MILITARY JUDGE ABUSED HIS DISCRETION DURING THE GOVERNMENT'S CASE IN CHIEF BY OVERRULING TRIAL COUNSEL'S OBJECTION TO INADMISSIBLE HEARSAY BECAUSE THE ANSWER SOUGHT, THAT APPELLANT'S WIFE WANTED A DIVORCE AND THEREFORE HAD NO INTENTIONS OF TRAVELLING TO GEORGIA TO LIVE WITH APPELLANT, DID NOT QUALIFY AS AN EXCEPTION TO THE HEARSAY RULE. (CITATIONS OMITTED.)

but assumed that he was saying that "the gentleman was guilty." Record at 402. LtCol [J] said that he was influenced by the remark, that he could disregard it, and did not feel uncomfortable because of it.

After obtaining all of the facts surrounding the incident, the military judge asked both counsel if they had any challenges or any other matter. Both replied negatively. Record at 405. The military judge found, judging from both his answers and his demeanor, LtCol [J]
had not been influenced by the remark, and allowed him to remain on the court. The appellant now argues that LtCol [J] should have been excused.

Having examined the entire record, including the appellant's acquittal of the most serious offenses he faced (rape and kidnapping), the fact that he was convicted of only offenses for which the evidence was overwhelming, and the facts surrounding the incident in which the remark was made, we are satisfied beyond a reasonable doubt that the findings and sentence have not been affected by Major [H]'s statement to LtCol [J]. *United States v. Stombaugh*, 40 M.J. 208 (C.M.A. 1994). Moreover, the appellant's decision at trial not to challenge LtCol [J] or request other relief when invited to do so waived the issue. Rule for Courts-Martial 912(f)(4), manual for Courts-Martial, United States, (1995 ed.).

The Disallowance of the Defense's Peremptory Challenge

The appellant wanted to exercise his peremptory challenge against Staff Sergeant [SSgt] [H], the only female member on the court-martial panel. When he did so, the trial counsel noted that SSgt [H] was a female, and he requested the defense to specify a non-gender related reason

for the challenge. The military judge asked the defense counsel if SSgt [H]'s gender had entered into the decision to challenge her. Defense counsel said it had. Record at 132. The military judge noted that SSgt [H] was the only female on the panel, and in light of the fact that the defense had no other basis for its peremptory challenge against her, found that it was "improper." He allowed the defense to exercise its peremptory challenge against another member, and it did so. The appellant now asserts that the military judge's disallowance of the peremptory challenge against SSgt [H] was error.

In *Batson v. Kentucky*, 476 U.S. 79 (1986), the Supreme Court held that a defendant may raise an equal protection challenge to the use of peremptory challenges by showing that the prosecutor used them for the purpose of excluding members of the defendant's race. Likewise, in *J.E.B. v. Alabama ex rel. T.B.*, 114 S.Ct. 1419 (1994), the Court held that gender, like race was an unconstitutional criterion for juror competence and impartiality. As the law now stands, whether the trial is civil or criminal, potential jurors, as well as litigants, have an equal protection right to jury selection procedures that are free from state-sponsored group stereotypes rooted in, and reflective of historical prejudice. *J.E.B.; Georgia v. McCollum*, 112 S.Ct. 2348 (1992) (holding that criminal defendants violate the Constitution when engaging in purposeful discrimination ont he basis of race when exercising peremptory challenges); *Powers v. Ohio*, 499 U.S. 400 (1991) (holding that a criminal defendant may object to race-based exclusion of jurors through peremptory challenges even though the excluded jurors and the defendant are not of the same race); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991) (racial discrimination in civil litigant's exercise of peremptory challenges violates the Equal Protection Clause).

In *United States v. Santiago-Davila*, 26 M.J. 380 (C.M.A. 1988) the Court of Military Appeals applied the *Batson* holding to the military justice system. While noting the fundamental difference between civilian juries and court-martial members, it found that the equal protection right to be tried by a group free from racial exclusions was a part of due process under the Fifth Amendment. Therefore, this right applied in the military context with the same force as it did in civilian trials. The Court later held that every peremptory challenge by the Government of a member of the accused's race, upon objection, had to be explained by the trial counsel. *United States v. Moore*, 28 M.J. 366 (C.M.A. 1989). And, even where trial counsel provides a race-neutral reason for a peremptory challenge, that challenge should not be allowed when a second impermissible reason is also given. *United States v. Greene*, 36 M.J. 274 (C.M.A. 1993).

Today, we are faced with a question of first impression: may the accused in a trial by court-martial exercise his sole peremptory challenge against a member of the court-martial when the gender of the challenged member is a stated reason for the exercise of the challenge? We hold that he may not, and, consequently, that the military judge did not err in disallowing the defense's peremptory challenge against SSgt [H].

As we read the precedents from the Supreme Court and the Court of Military Appeals, we have no doubt that race and gender have no place in the determination of a court-martial member's competence. *J.E.B.; Batson.* Article 25(d)(2), UCMJ, lists the traits the convening authority is to consider in appointing a member (age, education, training, experience, length of service, and judicial temperament). Race and gender are not included.

See also United States v. Smith, 27 M.J. 242 (C.M.A. 1988)(holding that appointment of female court members to attempt to achieve a particular result may violate the Equal Protection Clause). They are also impermissible considerations in the exercise of peremptory challenges. In light of the Supreme Court's holding in *McCollum* that criminal defendants' peremptory challenges constitute state action, and in view of *J.E.B.'s* holding that intentional discrimination on the basis of gender by state actors violates the Equal Protection Clause, we conclude that criminal defendants, including those in the military, may not exercise a peremptory challenge on the basis of gender in whole or in part. Gender is simply not a permissible factor to consider in the exercise of peremptory challenges, and governmental action exists in the discriminatory action of the accused exercising a peremptory challenge basis on gender.

From the record before us, we have concluded that the only reason for the defense challenge was the gender of SSgt [H]. Defense counsel articulated no other rationale. This was a contested rape case, and it appears the defense was trying to secure an all-male panel. Because of the expressed reason by the defense counsel, disallowance of the challenge was appropriate.

Remaining Issues

We also find the remaining issues without merit. The military judge was not required to make essential findings in his multiplicity ruling because no factual issues were involved. His ruling on the defense counsel's hearsay objection was correct because trial counsel was not offering the statement for the truth of the matter asserted, but to show the effect of the statement on the appellant. Finally, we

have concluded that the sentence, which includes an unsuspended bad-conduct discharge, is not inappropriately severe.

Decision

Accordingly, the findings and sentence, as approved on review below, are affirmed.